IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1957

No. 18

CITY OF DETROIT, a Michigan
Municipal Corporation, and
COUNTY OF WAYNE, a Michigan
Constitutional Body Corporate,
Appellants,

vs.

THE MURRAY CORPORATION OF AMERICA,
a Delaware Corporation, Appellee, and
THE UNITED STATES OF AMERICA, Intervenor

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 36

CITY OF DETROIT, a Michigan
Municipal Corporation, and
COUNTY OF WAYNE, a Michigan
Constitutional Body Corporate,
Petitioners,

vs.

THE MURRAY CORPORATION OF AMERICA,
a Delaware Corporation, Respondent, and
THE UNITED STATES OF AMERICA, Intervenor

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Reply Brief
of
Appellee and Respondent

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Two days before the oral argument, Appellants filed a 47 page reply brief (in addition to their initial 130 page presentation). A few comments in respect thereto may be helpful to the Court.

I.

Appellants' belated effort to distinguish Ansonia is specious.

Ansonia, 218 U.S. 452, 467, is and throughout has been a key authority for the proposition that title and beneficial ownership vests in the United States—not merely lien or security title—under partial payment title vesting clauses, where the seller and the buyer clearly intend title to pass to goods "before its completion and at different stages of its progress". Both the District Court and Circuit Court of Appeals relied thereupon. Notwithstanding, Appellants only casually considered *Ansonia* in their main brief and then belatedly attempt to distinguish it from the case at bar in a tenuous argument in their reply brief (pp. 3-4; 11-12; 16-25).

In effect, Appellants claim that *Ansonia* is different from the present case, because "The contractor **there** agreed to sell and the Government agreed to buy each completed part of the vessel and to pay full price therefor." where **here** "The Government neither purchased nor ever intended to have beneficial use of materials or to take delivery of them, except as they were formed and processed into specific end items" (Appellants' Brief, p. 18).

Appellants argue that "completed parts" was the thing to which title passed in *Ansonia* and that would not embrace materials, supplies and work in process at Murray, prior to their becoming completed parts (Appellants' Reply Brief, pp. 4, 11-12, 17-19).

Title to the vessel passed to the United States upon partial payment "before its completion" and while the work

thereupon was in "progress" (*Ansonia*, p. 457). Payments in *Ansonia* were to be made in "ten (10) equal payments . . . when the hull and propelling machinery should be 10 per cent complete, the second when 20 per cent complete, and so on . . . " (*Ansonia*, pp. 465-6). A 10 per cent completed hull or propelling machine is not a completed part—as suggested by Appellants here. The reference in "Section 211" of the *Ansonia* contract referring to "The **parts** paid for under the system of partial payments . . . shall thereupon become the sole property of the United States . . . " (*Ansonia*, p. 466) means no more than that **portion** of the hull and propelling machinery completed—to-wit, "10 per cent complete" (*Ansonia*, pp. 465-6) and not any completed or severable unit or part of the vessel. As used in *Ansonia* the reference to "parts paid for" clearly meant **portions** of the **uncompleted vessel** . . . at different stages of its **progress**. (*Ansonia*, pp. 466-472).

Clarkson v. Stevens, 106 U.S. 505, discussed by Appellants in their reply brief, clearly holds that the United States may acquire title to "materials" prior to their being formed into the vessel or a completed unit thereof, where such intent is expressed in the contract. Furthermore, the Court in *Ansonia*, (p. 469) recognizing that in *Clarkson* v. *Stevens*, the contract only provided for title of "materials received at the yard", but not to the vessel as fast as parts thereof were constructed, did not preclude the vesting of title in the United States as the work progressed where the contract did so provide. The subcontracts in the case at bar clearly provide in unequivocal language that

> "Upon the making of any partial payment, under this contract title to all parts, **materials, inventories, work in process** and non-durable tools theretofore acquired or produced by the contractor for the performance of this contract, and properly chargeable thereto . . . shall forthwith vest in the Government; and title to all like property thereafter acquired . . . shall vest in

the Government forthwith upon said acquisition or production." (R. 175; 184). (See Appellee's Initial Brief, pp. 12-14; 16-17).

In *Ansonia* the Court was aware of the difference between partial payment title vesting clauses, (vesting absolute **title** in the United States, as **buyer**) and advance and loan provisions, where the Government only obtained a **lien.**

II.

Appellants' argument that title to "materials" in United does not satisfy prohibition of R.S. 3648, as do "specifications" is likewise fallacious.

So long as the United States is vested with title to goods, whether in process or in material form, or receives the benefit of services, it may properly make payment for the equivalent value thereof without violating R.S. 3648.

The equivalent in value is the determining factor and not the form of the goods or services. (See our initial brief and authorities, pp. 43-47).

III.

"Risk of loss" and disposition "upon terms approved by contracting officer".

Appellants argued and *American Motors* held that because the "risk of loss" was in the contractor (seller), title and ownership did not vest in the United States (the buyer).

This is directly contrary to *Ansonia*, (p. 465) where the contractor, under "Section 206 of the specifications . . . assumes full responsibility for . . . plant and materials and for any damage or injury done . . . to them from any source or cause".

See Williston on Sales, Sec. 302, Rev. Ed., and our initial brief, pp. 72-5.

Furthermore, Appellants and *American Motors* erroneously contend that the power of disposition of any materials on hand is in the contractor in a manner inconsistent with Government ownership.

This clearly is not so. The contract expressly requires that no property under the contract may be disposed of except "upon terms approved by the contracting officer" (R. 176) and this absolute control in the Government of property owned by it, effectively precludes disposition by the contractor without prior direction or approval of the Government. This approval is more than a mere bookkeeping requirement, as suggested by Appellants and *American Motors*. Furthermore, the proceeds of any disposition belong to the Government.

CONCLUSION

In these critical times when greatly increased defense expenditures by the Federal Government is imperative, and States and municipalities are clamoring for increased revenues, and seek to tax defense material of the Government in the hands of contractors, the remedy, (waiver of immunity), if any, is not judicial, but is for Congress, which presently is giving thorough study to the problem.

Respectfully submitted,

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